IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 106

ALABAMA POWER COMPANY, ET AL., *Appellants*,

v.

UNITED STATES OF AMERICA, ET AL., *Appellees*.

On Appeal From the United States District Court for the District of Columbia

BRIEF FOR THE APPELLANTS

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INDEX

	Page
OPINION BELOW	1
JURISDICTION	2
QUESTION PRESENTED	2
STATUTES INVOLVED	2
STATEMENT	2
The Pleadings Below	2
The Decision Below	3
Position of the Parties	3
The Commission Proceeding	3
SUMMARY OF ARGUMENT	8
ARGUMENT	
I. An order authorizing a general increase in rates is subject to judicial review	9
II. Orders modifying outstanding orders and granting Fourth Section Relief are subject to judicial review	21
A. Orders modifying outstanding orders	21
B. Orders granting Fourth Section Relief	23
CONCLUSION	25
APPENDIX	App. 1

CITATIONS

CASES:

Abbott Laboratories v. *Gardner*, 387 U.S. 136 .... 8, 9, 10, 12, 16, 17

AGSCO Chemical, Inc. v. *Albama Great Southern R. Co.*, 314 I.C.C. 725 19

Alabama State Docks Dept. v. *Alabama, T. & N. R. Co.*, 321 I.C.C. 347 19

Algoma Coal and Coke Co v. *United States*, 11 F. 487 (E.D. VA.) 8, 20

Barlow v. *Collins*, 397 U.S. 159 10

Chicago, Burlington & Quincy Railroad Co. v. *United States*, 242 F.Supp. 414, aff'd 382 U.S. 422 23

City of Chicago v. *United States*, 396 U.S. 162 .... 8, 10

Columbia Broadcasting System v. *United States*, 316 U.S. 407 12

Data Processing Service v. *Camp*, 397 U.S. 150 10

Ex Parte No. 256, Increased Freight Rates, 1967, 329 I.C.C. 854 7

Ex Parte No. 256, Increased Freight Rates, 1967, 332 I.C.C. 280 .... 6, 7

Page

Federal Power Commission v. *Natural Gas Pipeline Co.*, 315 U.S. 575 14
Frozen Food Express v. *United States*, 351 U.S. 40 ..12, 15
Gardner v. *Toilet Goods Association*, 387 U.S. 167 ..... 16, 17, 18
Interstate Commerce Commission v. *Inland Waterways Corp.*, 319 U.S. 671 12
Koppers Co., Inc. v. *Chespeake & O. Railroad Co.*, 303 I.C.C. 383 .....19, 20
Matthiessen & Hegeler Zinc Co. v. *Baltimore & O.R. Co.*, 323 I.C.C. 601 18
A. L. Mechling Barge Lines, Inc. v. *United States*, 376 U.S. 375 24
New England Divisions Case, 261 U.S. 184 15
Permian Basin Area Rate Cases, 390 U.S. 747 15
Shaughnessy v. *Pedreiro*, 349 U.S. 48 10
Toilet Goods Association v. *Gardner*, 387 U.S. 158 16
United States v. *Storer Broadcasting Co.*, 351 U.S. 192 12
Western Paper Makers' Chemical Co. v. *United States*, 271 U.S. 268 12

UNITED STATES STATUTES:

Administrative Procedure Act
5 U.S.C. § 551 2
5 U.S.C. § 551(4) 8, 10, 14
5 U.S.C. § 551(13) 8, 10
5 U.S.C. § 702 2
5 U.S.C. § 704 .....2, 8, 10, 18

Federal Rules of Civil Procedure
Rule 23 21

Interstate Commerce Act
49 U.S.C. § 4(1) 2, 4, 23
49 U.S.C. § 13 .....11, 12, 19, 20, 21
49 U.S.C. § 13(1) 2
49 U.S.C. § 15(1) 2
49 U.S.C. § 15(7) 2, 3, 11, 12
49 U.S.C. § 15a(2) 2, 7, 12

Other Statutes
21 U.S.C. § 376(c) 16
28 U.S.C. § 701(a) 10
28 U.S.C. § 1253 2
28 U.S.C. § 1336 .....8, 10
28 U.S.C. § 2101(b) 2

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BRIEF FOR THE APPELLANTS

OPINION BELOW

The opinion of the District Court (213a)[1] is not yet officially reported. The initial and final reports of the Interstate Commerce Commission (248a, 281a) are reported at 332 I.C.C. 590 and 332 I.C.C. 714 respectively.

[1] This case has been consolidated for argument with *Atlantic City Electric Company, et al.* v. *United States*, No. 78. Since the issue in both cases is the reviewability of the same orders of the Commission, a Consolidated Appendix has been filed. "a" refers to the Consolidated Appendix. *App.* refers to the Appendix printed as part of this brief.

JURISDICTION

The judgment of the District Court was entered December 18, 1969. Notice of Appeal was filed February 4, 1970. The Jurisdictional Statement was filed March 5, 1970 and probable jurisdiction was noted May 18, 1970. The jurisdiction of this Court rests on 28 U.S.C. §§ 1253 and 2101(b).

QUESTION PRESENTED

May shippers, both individually and as a class, be denied judicial review of Commission orders, entered after hearing and investigation, which (1) authorize across-the-board increases in the level of railroad freight rates and charges, and (2) modify outstanding rate orders and grant Fourth Section Relief to the extent necessary to permit the increases to become effective?

STATUTES INVOLVED

The relevant sections of the Administrative Procedure Act (5 U.S.C. §§ 551, 702 and 704) and of the Interstate Commerce Act (49 U.S.C. §§ 4(1), 13(1), 15(1), 15(7), and 15a(2)) are set forth in the Appendix.

STATEMENT

The Pleadings Below

The complaint seeks review, in behalf of the plaintiffs individually and of all shippers as a class, of the Commission's orders of November 25, 1968, and January 9, 1969, in *Ex Parte No. 259, Increased Freight Rates, 1968* (248a, 281a) which authorize a nationwide increase in the level of railroad freight rates. An intervening supporting complaint was filed by the Secretary of Agriculture. (192a)

The answer of the United States "neither admits nor denies" the allegations of the complaint and "neither supports nor opposes the order of the Commission." (207a) The Commission's answer undertakes to defend its orders on the merits but "expressly waive[s]" jurisdictional defenses. (204a) The railroads intervened as defendants. Their answer contests the Court's jurisdiction, asserting that the Commission's orders are not judicially reviewable. (186a)

The Decision Below

The Court below did not reach the merits. In a 2-1 decision (Wright, J., dissenting) it held that it lacked jurisdiction to review the Commission's orders and dismissed the complaint.

Position of the Parties

The United States, the Commission and the Secretary of Agriculture agree with plaintiffs that the Commission's orders are reviewable and that the judgment of the District Court should be reversed. Only the railroads take a contrary position.

The Commission Proceeding

An increase in a railroad rate or group of rates is usually initiated by publication, on 30 days' notice, of a tariff of the increased rates, which the Commission may investigate and, pending investigation, may suspend for a period of not over seven months (49 U.S.C. § 15(7) *App.* 7). A general increase in rates cannot be instituted that simply, however. Outstanding orders prescribing maximum reasonable rates must be modified before increases in such rates can be published and special permission must be obtained

to publish those increases which result in violations of the long and short haul provisions of Section 4(1) of the Interstate Commerce Act (49 U.S.C. § 4(1) *App.* 4). Moreover, the multitude of rates affected makes publication of new tariffs in the usual way impracticable. The railroads prefer to publish a master tariff with connecting link supplements,[2] but this also requires Commission approval. For these reasons it has become customary for the railroads to institute general increase cases by filing a petition requesting the various forms of relief required before the increases can become effective.

That was done in this case. On March 7, 1968, the nation's railroads filed a petition asking:

> . . . for authority to depart from the Commission's tariff rules, and for such other relief as may be necessary to enable them to publish increases in freight rates and charges to and from points generally throughout the United States, and to and from points in Canada, by means of a master tariff, connecting link supplements and other necessary tariffs and supplements. (227a)

> . . . for the modification of all outstanding orders of the Commission to the extent necessary, (1) to permit, initially, only the publication of the proposed increases in rates and charges, and (2) following the receipt and consideration of evidence in the form of verified statements, to permit the actual charging of the proposed increases upon a finding that the general level of rates as increased will be just and reasonable. (227a)

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[2] The master tariff contains all of the increases proposed. By supplement to each tariff, the rates therein are made subject to the increases contained in the master tariff.

And for

> . . . such further orders granting new and modified Fourth Section Relief and all other relief that may be necessary to permit the proposed tariffs to become effective without suspension. (234a)

On March 8, 1968, the Commission authorized the filing of the tariffs on 75 days' notice and modified outstanding orders but only to the extent necessary to permit the filing of the tariffs. (236a) On March 11, 1968, the railroads filed their master tariff X-259 containing schedules of increases ranging from 3 to 10 percent and averaging about 5 percent. On June 19, 1968, the Commission suspended the increases to the extent that they exceeded 3 percent and instituted an investigation:

> . . . concerning the lawfulness of all the rates, charges and regulations which were contained in the suspended schedules, as aforesaid as well as the schedules herein authorized to be filed . . . (240-241a)

On July 3, 1968, the Commission divided the proceeding into ten sub-proceedings—"Sub-No. 2—RAILROAD COST AND REVENUE NEED", and Sub-Nos. 3-11, to each of which it assigned one or more commodities or services. (243a) Hearings were held in each of the sub-proceedings. The issue in Sub-No. 2 was the extent, if any, by which the general level of freight rates should be raised. The issues in the other sub-proceedings related to the application of the proposed increases to rates on specific commodities or services. Plaintiffs participated in Sub-No. 2, and in some of the other sub-proceedings and opposed authorization of the increases.

On November 25, 1968, the Commission issued its report and order in Sub-No. 2, authorizing, effective on one day's notice, increases approximating $465 million annually, and modifying existing orders and granting Fourth Section Relief to the extent necessary to permit the increases to become effective. (248a, *App.* 9[3]) On January 9, 1969, it issued a further report and order devoted primarily to the distribution of the authorized increases among the various commodities and services. That report adopts the findings of the November 25 report with respect to the railroads' revenue needs "as though fully restated." (282a) It is necessary, therefore, to go to the earlier report to determine the basis for such findings.

In the November 25 report the Commission based its ultimate finding as to revenue needs on a single subsidiary finding—that the increases sought, together with those authorized in *Ex Parte No. 256, Increased Freight Rates, 1967*, 332 I.C.C. 280, were less than the increases in operating costs incurred since 1966.[4] It justified use of 1966 as a base year as follows:

> Use of 1966 as a base year is reasonable, and fair to shippers, because it reflects recent experience not complicated by a major rate revision, and the traffic volume is close to the current level. (263a)

[3] The order portion of the November 25, 1968, report and order was inadvertently omitted in the printing of the Consolidated Appendix. It is included in the Appendix printed as part of this brief.

[4] The Commission also referred to the railroads' rate of return as "inadequate" and "substandard" but stated that its decision "rests upon other grounds". (265a) The Commission's brief in the Court below disavows any reliance on rate of return and chides plaintiffs for discussing it, stating that "plaintiffs are 'tilting at windmills' for the Commission conceded that rate of return was not a statutory standard of rate making." (p. 20.)

The Commission made no findings as to the amounts needed for such things as debt service, dividends and capital improvements. It ignored, for example, the fact that the railroads had represented to the Commission in *Ex Parte No. 256, Increased Freight Rates, 1967*, that the funds needed for capital improvements in 1967 would be more than a half billion dollars less than in 1966[5] and did not consider the extent to which a reduction in the need for capital expenditures might reduce the need for increased revenues. Furthermore, despite demonstrated wide differences in the financial needs of the railroads in the eastern, western and southern parts of the nation, it authorized the same measure of increase nationwide without stating any justification for such action.

In the Court below plaintiffs challenged the lawfulness of the Commission's orders on a number of grounds, including failure to apply the standards and make the findings required by Sec. 15a(2) of the Interstate Commerce Act, lack of requisite subsidiary findings and lack of substantial evidence. The District Court declined to pass on these issues and dismissed the complaint on jurisdictional grounds.

If the Court agrees that the District Court was in error in holding that the Commission's orders are not reviewable, we assume that it will remand the case to the District Court for a determination on the merits. Accordingly, we are briefing only the jurisdictional question.

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[5] In 1966 the railroads spent $1,953 million on capital improvements. In *Ex Parte No. 256* the 25 "test roads" (about 87 percent of the railroad industry) advised the Commission that they expected to spend "over $1,233 million" for capital improvements in 1967. *Ex Parte No. 256, Increased Freight Rates, 1967*, 329 I.C.C. 854, 873.

SUMMARY OF ARGUMENT

The basic principle governing judicial review of administrative orders is that review will not be denied unless "there is persuasive reason to believe" that Congress so intended. *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 140. The Commission orders here challenged authorize a nationwide increase in railroad freight rates and Congress has expressly provided for judicial review both in 28 U.S.C. § 1336 and in the Administrative Procedure Act, 5 U.S.C. §§ 551(4)(13), 704.

The Commission's Report and Order of January 9 are the last step in the general increase proceeding. In it the Commission authorized the railroads to make the increases effective, found that the rates as increased did not exceed a maximum reasonable level and that the additional revenues to be derived from the increases were necessary to permit the railroads to provide adequate and efficient railway transportation service and ordered the proceeding discontinued. The Commission action clearly meets all accepted standards of finality.

The majority of the District Court viewed the case as governed by *Algoma Coal and Coke Co.* v. *United States*, 11 F. Supp. 487 (E.D. Va.), and dismissed the action on the grounds that (1) the Commission orders were permissive and (2) plaintiffs have available an administrative remedy by filing a complaint with the Commission challenging "any particular rates which affect them". The permissive order doctrine was finally put to rest in *City of Chicago* v. *United States*, 396 U.S. 162, and the railroads disclaimed reliance on it in their Motion to Affirm.

The Commission order meets the accepted tests of ripeness as set out in *Abbott*, pp. 148-9, notwithstanding the reservation to interested parties of the right to bring "maladjustments" to the Commission's attention for correction by filing a subsequent complaint. Such a reservation has never been held to impair either the finality of agency action or its ripeness for judicial review.

Plaintiffs have no further administrative remedy. They are not complaining of maladjustments in specific rates but of the general increase as applied to all rates. A subsequent complaint case would afford no opportunity to obtain a re-examination by the Commission of its order permitting a general increase. The Commission has expressly so held and this is eminently reasonable. Having completed a full investigation, the Commission should not re-till the same ground in individual rate cases.

In addition to authorizing rate increases, the Commission modified all outstanding orders and granted blanket Fourth Section Relief to the extent necessary to permit the authorized increases to become effective. Such action provides additional bases for judicial review.

ARGUMENT

I

An Order Authorizing a General Increase in Rates Is Subject to Judicial Review

In determining whether an order of an Administrative Agency is judicially reviewable, the starting point is the principle that

> . . . judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the

purpose of Congress. *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 140.[6]

This principle was reaffirmed in *City of Chicago* v. *United States*, 396 U.S. 162, 164 and in *Barlow* v. *Collins*, 397 U.S. 159, 166.

Neither the Court below nor the railroads in their Motion to Affirm have pointed to anything suggesting a Congressional purpose to deny judicial review of the orders here involved. On the contrary, Congress has expressly provided for judicial review. The Administrative Procedure Act provides for review of orders approving or prescribing rates[7] and 28 U.S.C. § 1336 provides for review of Commission orders generally.

What is there about the Commission's orders here challenged which could possibly make these clear statutory provisions inapplicable? In the Court below the railroads argued that the Commission's orders are un-

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[6] This Court has frequently reiterated that the "generous review provisions" of the APA must be given a "hospitable interpretation". *Abbott Laboratories, supra*, p. 141. *Shaughnessy* v. *Pedreiro*, 349 U.S. 48, 51, *Data Processing Service* v. *Camp*, 397 U.S. 150, 156.

[7] "'rule' . . . includes the approval or prescription for the future of rates . . ." 5 U.S.C. § 551(4).

"'agency action' includes the whole or a part of an agency rule . . ." 5 U.S.C. § 551(13).

"Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review." 5 U.S.C. § 704.

We do not understand that there is any contention that "statutes preclude judicial review" or that the Commission's action is "committed to agency discretion by law" within the exception in 5 U.S.C. § 701(a).

reviewable because permissive and the opinion of the majority of the District Court appears to be based, at least in part, on the permissive nature of the Commission's action. This argument has now been abandoned. The railroads now concede that a contention

> . . . that the Commission's order is unreviewable because it is permissive or negative in form. * * * is not tenable today. (Motion to Affirm, p. 14.)

The railroads' present position is that we are dealing with a "preliminary" order[8] and that plaintiffs are not entitled to Court review until they have filed and litigated a complaint under Sec. 13 of the Interstate Commerce Act against the rates in which they are interested.

The argument that a complaint must be filed under Sec. 13 indicates a misunderstanding of the relationship between Sec. 13 and Sec. 15(7) of the Interstate Commerce Act. The two sections provide alternative and not successive procedures. If the Commission institutes an investigation of rates after a tariff has been filed but before the rates have become effective, it proceeds under Sec. 15(7); if the rates are already in effect, it proceeds under Sec. 13. Under both sections the Commission may act either upon complaint of an interested party or upon its own initiative.

The Commission proceeding here involved was a Sec. 15(7) case. After obtaining the preliminary authority needed to permit them to do so, the railroads published the schedule of increased rates. Sec. 15(7) authorizes the Commission "upon complaint or upon

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[8] The railroads' Motion to Affirm characterizes the Commission action in this proceeding as preliminary no less than seven times. See Reply to Motion, pp. 2, 3.

its own initiative without complaint" to investigate the lawfulness of any proposed rate and to suspend its effectiveness for a period not longer than seven months. The Commission, acting under the authority of Sec. 15(7), suspended the schedules in part and instituted an investigation.

Once an investigation has been instituted, a Sec. 15(7) case is distinguishable from a Sec. 13 case only in that the burden of proof is on the carrier instead of on the complainant. The Rule of Rate Making set out in Sec. 15a(2) must be followed alike in Sec. 15(7) and in Sec. 13 proceedings and the Commission may make any order in the one that it could make in the other. Sec. 15(7) provides that:

> . . . after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective.

The fact that an order is issued under Sec. 15(7) rather than under Sec. 13 does not preclude judicial review. *Interstate Commerce Commission* v. *Inland Waterways Corp.*, 319 U.S. 671, *Western Paper Makers' Chemical Co.* v. *United States*, 271 U.S. 268.

The Commission's orders in this case are final by any accepted standard. *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, *Columbia Broadcasting System* v. *United States*, 316 U.S. 407, *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192, *Frozen Food Express* v. *United States*, 351 U.S. 40. The action taken in the November 25 order in the Sub-No. 2 proceeding finally disposed of the question of revenue need. The

Commission found that, without the additional revenue involved, earnings would be insufficient to enable the railroads to provide adequate and efficient transportation service. It also found that "The increased freight rates and charges herein authorized will not exceed a maximum just and reasonable level of rates and charges" (275a) and ordered that "freight rates and charges, to the extent authorized herein, may be made effective upon no less tahn 1 day's notice." (*App.* 9) The Commission's Report and Order of January 9 dealing with individual commodities adopts the findings in the earlier report as to revenue needs; and finds that "The increased freight rates and charges authorized herein will not exceed a maximum reasonable level." The Commission allowed the rates to be made effective on less than statutory notice and ordered "that this proceeding be, and it is hereby, discontinued." (395a)

"Preliminary" is a strange way to characterize an order which finally disposes of the question of revenue needs, authorizes increased rates to be put into effect, finds that the rates authorized will not exceed a just and reasonable level and discontinues the proceeding.

The railroads appear to hang their contention as to the "preliminary" nature of the general increase proceeding on the following finding which appears in both Reports:

> Our findings as to justness and reasonableness, which are based upon all of the evidence before us, including typical evidence as to rates and charges in and between all territories, will apply to the general bases of rates and charges, *and will not preclude interested parties from bringing*

> *any maladjustments to our attention for correction.*[9] The increased freight rates and charges authorized herein are not considered as prescribed within the meaning of the decision in *Arizona Grocery Co.* v. *Atchison, T. & S. F. Ry. Co.*, 284 U.S. 370,[10] and will, in all respects, be subject to complaint and investigation as provided by the act. [Finding 5. November 25 Report] (275-276a); [Finding 15. January 9 Report] (393a).

In the general field of regulation the rate case involving the revenue needs of the regulated utility is the norm rather than the exception. In such cases there are two separate and distinct issues. As stated in *Federal Power Commission* v. *Natural Gas Pipeline Co.*, 315 U.S. 575, 584:

> The establishment of a rate for a regulated industry often involves two steps of different character, one of which may appropriately precede the other. The first is the adjustment of the general revenue level to the demands of a fair return. The second is the adjustment of a rate schedule conforming to that level so as to eliminate discriminations and unfairness from its details. Such an orderly procedure for establishing the rates prescribed by the Act would seem to be an appropriate means of carrying out its provisions.

This is precisely what the Commission did in *Ex Parte No. 259.*

To our knowledge this Court has never held that an order adjusting a general level of rates is not a final order subject to review until the regulatory agency

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[9] Emphasis supplied in this brief unless otherwise noted.

[10] That rates are approved rather than prescribed does not affect the reviewability of a rate order " 'rule' . . . includes the approval or prescription for the future of rates." 5 U.S.C. § 551(4).

has resolved all of the problems involved in adjusting individual rate schedules. In *Permian Basin Area Rate Cases,* 390 U.S. 747, the Court reviewed a Federal Power Commission order establishing a general level of rates, which contained a provision described by the Court as follows:

> The Commission declared that a producer should be permitted "appropriate relief" if it establishes that its "out-of-pocket expenses in connection with the operation of a particular well" exceed its revenue from the well under the applicable area price. 390 U.S. 747, 770-771

This provision is indistinguishable in principle from the provision in the orders here involved permitting interested parties to bring "maladjustments" to the Commission's attention for correction. Also indistinguishable is the *New England Divisions Case,* 261 U.S. 184, in which the Commission prescribed a general basis for divisions between the New England and other railroads but "left the door open for correction upon application of any carrier in respect to any rate." (p. 187) Similarly, in *Frozen Food Express* v. *United States,* 351 U.S. 40, this Court held reviewable an order of the Interstate Commerce Commission specifying the commodities deemed to fall within the class of exempt agricultural commodities, despite "the Commission's willingness, in individual cases, to reconsider its determination with respect to particular commodities . . . ." (P. 47, dissenting opinion) In none of these cases was the retention by the Commission of jurisdiction to correct specific maladjustments deemed to make its order unreviewable.

The question of when agency action is ripe for review was given extensive consideration by this Court

in three cases dealing with regulations issued by the Commissioner of Food and Drugs, *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, *Toilet Goods Association* v. *Gardner*, 387 U.S. 158, and *Gardner* v. *Toilet Goods Association*, 387 U.S. 167.

The rationale of the ripeness doctrine was stated in *Abbott Laboratories* as follows:

> . . . it is fair to say that its basic rationale is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties. The problem is best seen in a twofold aspect, requiring us to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration. 387 U.S. 136, 148-149

The application of this doctrine can be illustrated by contrasting the regulations held reviewable in *Gardner* with the one held unreviewable in *Toilet Goods Association*.

Gardner and *Toilet Goods Association* were separate appeals from a decision of the Court of Appeals for the Second Circuit. The regulation challenged in *Toilet Goods Association* provided that the Commissioner of Food and Drugs "may immediately suspend certification service"[11] if officials are denied access to "all manufacturing facilities, processes and formu-

[11] The Color Additive Amendments of 1960 require certification of each "batch" of color additive unless exempted by regulation. 21 U.S.C. § 376(e).

lae involved in the manufacture of color additives and intermediates from which such color additives are derived;" 387 U.S. 158, 161.

This regulation was held not to be ripe for judicial review because:

> The regulation serves notice only that the Commissioner *may* under certain circumstances order inspection of certain facilities and data, and that further certification of additives *may* be refused to those who decline to permit a duly authorized inspection until they have complied in that regard. At this juncture we have no idea whether or when such an inspection will be ordered and what reasons the Commissioner will give to justify his order. 387 U.S. 158, 163. (Emphasis in original)

One of the three regulations challenged in *Gardner* can be taken as illustrative. It defined color additives as including "diluents" (certain components of a color additive mixture which are not themselves color additives). Plaintiffs could have obtained further administrative review by submitting each color additive for premarketing clearance but the Court found that the burden of doing so would be substantial and that the regulations were ". . . ripe for judicial review under the standards elaborated in *Abbott Laboratories* v. *Gardner, supra,* namely the appropriateness of the issues for judicial determination and the immediate severity of the regulations' impact upon the plaintiffs." 387 U.S. 158, 170

That the orders here involved are reviewable under the *Abbott* standards would seem to follow, *a fortiori.* The increase in the general level of freight rates approved by the Commission is costing shippers hundreds of millions of dollars annually. The impact of the

Commission's decision upon plaintiffs has certainly been severe and the hardship to them of withholding Court action would be substantial. There is no possibility of the Court entangling itself in an administrative proceeding which is still awaiting a final determination. The Commission has made its decision and terminated the proceedings. There is nothing more for it to do.

Unlike the situation in *Gardner, supra,* shippers will have no opportunity to obtain further Commission review of its action.[12] The only thing left open in the Commission's order is the right to bring "maladjustments to our attention for correction" in another proceeding. But plaintiffs are not complaining of maladjustments in this case. They challenge the bases for the general increase itself.

The further administrative remedy suggested by the Railroads of filing complaints with the Commission against the myriad rates in which plaintiffs are interested, even aside from its obvious impracticability, is no remedy at all. In such proceedings the Commission would determine the lawfulness of each individual rate by measuring it against the new standards of reasonableness established in the orders here challenged. *Matthiessen & Hegeler Zinc Co.* v. *Baltimore*

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[12] Sec. 10 of the Administrative Procedure Act (5 U.S.C. § 704, *App.* 4) is relevant as indicating the intent of Congress that parties not be required to continue to try to persuade a regulatory agency to reverse action already taken. It provides that "Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority."

& O.R. Co., 323 I.C.C. 601, *Alabama State Docks Dept.* v. *Alabama, T. & N. R. Co.*, 321 I.C.C. 347; *AGSCO Chemical, Inc.* v. *Alabama Great Southern R. Co.*, 314 I.C.C. 725.

Thus, in *Alabama State Docks Dept.*, in finding that the assailed rates were not unjust and unreasonable, the Commission held:

> However, the assailed rate is below the maximum level prescribed on domestic clean rice in *Arkansas Rice Traffic Bureau* v. *Aberdeen & R.R. Co.*, 219 I.C.C. 5, 25, *as adjusted for general increases.* 321 ICC 347, 353

The argument that a shipper should seek re-examination of the cost and revenue findings in a general increase case by filing a subsequent complaint case with the Commission might be more persuasive if the Commission had not already ruled that this avenue is not open. In *Koppers Co., Inc.* v. *Chesapeake & O. Railroad Co.*, 303 I.C.C. 383, the complainant in a Sec. 13 proceeding sought to have the Commission consider whether increases authorized in a general increase case had been justified. The Commission declined to do so, stating:

> The complainant introduced in evidence a series of exhibits containing certified copies of the record in the Ex Parte No. 175 proceeding bearing upon the level of the water-transportation costs as between the New England and the New York ports. In this manner, it purports to attack our order in that proceeding. Admittedly, the variances in the assailed proportional rates stemmed from our general authorization in that proceeding, but whether or not the permissive order entered was justified based on the evidence of record therein is not a relevant consideration in the instant proceeding. 303 ICC 383, 387

The Memorandum filed jointly by the United States, the Commission and the Secretary of Agriculture concedes that in *Koppers* "the Commission appears to have taken" the position that review in a subsequent complaint case of cost and revenue findings which are the foundation of a general rate increase order would be improper. (pp. 6-7).

The rule established in *Koppers* is eminently reasonable. Good administrative practice dictates that the Commission should not reopen in a subsequent proceeding—let alone in a multitude of subsequent proceedings—issues just decided after extensive hearings.

In asserting that plaintiffs must file a complaint with the Commission under Sec. 13 before seeking Court review, the railroads (and the Court below) place major reliance on *Algoma Coal & Coke Co.* v. *United States*, 11 F.Supp. 487 (E.D. Va.). The plaintiffs there were not disputing the Commission's findings as to railroad revenue needs and did not seek to have the Commission's order overturned. They asked that it be set aside only as to specific rates on coal. As the Court noted, the requested action could "inject confusion and create discrimination as between the plaintiffs and coal operators in other territories . . ." (p. 492) and would be "necessarily inconsistent with the whole scheme of the Interstate Commerce Act which requires uniformity and nondiscrimination as to rates" (p. 496). Such policy considerations, whether or not they require that the Commission be afforded an opportunity to correct alleged maladjustments in particular rates before the Courts intervene, have no application where the challenge is to the bases for the general increase and not to the application of the increase to specific rates.

To assert that plaintiffs who are challenging the increase as to all rates have not exhausted their administrative remedies until they have filed complaints under Sec. 13 seems a bit farfetched. Since this is a class action, the filing of complaints on *all* rates would presumably be required.[13] Is there any rational basis for a rule which would require plaintiffs to file Sec. 13 complaints attacking the lawfulness of all rates, and then advise the Commission that they raise no question as to the distribution of the authorized increase among the various rates and commodities and wish to litigate in each of these cases the question—and only the question—whether the general increase in rail rates previously authorized was lawful? Surely this question answers itself.

II

Orders Modifying Outstanding Orders and Granting Fourth Section Relief Are Subject To Judicial Review

A. ORDERS MODIFYING OUTSTANDING ORDERS

The Commission hears many cases concerning the lawfulness of freight rates in the course of a year. If the shipper is granted relief, the final order limits

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[13] That this is a proper class action was recognized by Judge Wright in his dissenting opinion. (218a) All of the requirements of Rule 23, Federal Rules of Civil Procedure, are met. The class is so numerous that joinder of all members is impracticable, there are questions of law or fact common to the class, the claims or defenses of the representative parties (who are shippers or representatives of shippers paying over 20 percent of the nation's freight bill) are typical of the claims or defenses of the class, and the representative parties will fairly and adequately protect the interests of the class. In addition, the Commission and the railroads have acted or refused to act on grounds generally applicable to the class, and separate actions would create risk both of inconsistent adjudications and of adjudications which as a practical matter would be dispositive of the interests of other shippers.

the freedom of the railroads to initiate new rates by simply publishing new schedules. If an order prescribes the maximum reasonable rate on commodity X between points A and B, the railroads cannot increase that rate without further action by the Commission. It is therefore necessary for the railroads in a general increase case to obtain an order modifying all outstanding orders unless they propose to make the increases inapplicable to the rates covered by outstanding orders. The railroads sought and obtained such an order in this case. The November 25 order provides:

> . . . That, all outstanding orders of the Commission be, and they are hereby modified to permit the increases authorized herein to become effective. (*App.* 11)

The January 9 order provides:

> . . . That outstanding orders in other proceedings are hereby modified so as to permit establishment of the further changes in interstate freight rates and charges herein authorized; (395a)

The modification of outstanding orders was ignored in the opinion of the Court below but was noted by Judge Wright in his dissenting opinion:

> The effect of the order was to remove the upper limits on rates which the Commission had prescribed for certain commodities. Without this order, the railroads could not have increased any of the Commission-made rates. (217a)

What would be the situation of a shipper who, after years of litigation and the expenditure of thousands of dollars, obtained an order from the Commission on November 24, 1968, fixing a maximum lawful rate on

a movement of a commodity only to see the order set aside on the following day by the Commission's order in Ex Parte No. 259? He has clearly been directly aggrieved by the Commission's order. Surely he should not be required to go back to the Commission and relitigate the entire case which had just been concluded.

Chicago, Burlington & Quincy Railroad Co. v. *United States*, 242 F.Supp. 414, aff'd 382 U.S. 422, involved review of a Commission order in one case which reopened two other cases without notice to the parties and modified the orders therein. The Court reviewed this order and set it aside on the ground that it had been issued without notice to the parties in such proceedings. If an order modifying an outstanding order in two cases is subject to Court review, it would seem to follow that an order modifying *all* outstanding orders in *all* cases is likewise reviewable.

B. ORDERS GRANTING FOURTH SECTION RELIEF

Section 4(1) of the Interstate Commerce Act makes it unlawful for a railroad, without authorization from the Commission:

> . . . to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of like kind of property, for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance, or to charge any greater compensation as a through rate than the aggregate of the intermediate rates subject to the provisions of this chapter . . .

Fourth Section departures in the railroad rate structure are commonplace. A general increase in

rates, particularly when it includes holddowns and special provisions, inevitably produces additional Fourth Section departures. Unless blanket authorization were obtained, the railroads could not therefore inaugurate a general increase without violating the Act unless they were to go through all of their tariffs and eliminate any increase which would bring about a new violation of Section 4. Accordingly, the railroads asked and were granted blanket Fourth Section Relief. The November 25 order contains a supplemental Fourth Section order which provides *inter alia:*

> . . . That, carriers subject to the Interstate Commerce Act and parties to said proceeding be, and they are hereby, authorized to depart from the provisions of Section 4 of the act to the extent necessary to establish and maintain the increases in rates and charges authorized in the order in Ex Parte No. 259 of this date, November 25, 1968. (*App.* 11)

A similar supplemental Fourth Section order was entered on January 9, containing a provision identical to that quoted above except for the date.

That Fourth Section orders are reviewable is established by *A. L. Mechling Barge Lines, Inc.* v. *United States,* 376 U.S. 375.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the Court below should be reversed.

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APPENDIX

Administrative Procedure Act

5 U.S.C. § 551.

For the purpose of this subchapter—

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include—

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of the United States;

(D) the government of the District of Columbia;

or except as to the requirements of section 552 of this title—

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory; or

(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; chapter 2 of title 41; or sections 1622, 1884, 1891-1902, and former section 1641(b) (2), of title 50, appendix;

(2) "person" includes an individual, partnership, corporation, association, or public or private organization other than an agency;

(3) "party" includes a person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in an agency

proceeding, and a person or agency admitted by an agency as a party for limited purposes;

(4) "rule" means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing;

(5) "rule making" means agency process for formulating, amending, or repealing a rule;

(6) "order" means the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing;

(7) "adjudication" means agency process for the formulation of an order;

(8) "license" includes the whole or a part of an agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission;

(9) "licensing" includes agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation, amendment, modification, or conditioning of a license;

(10) "sanction" includes the whole or a part of an agency—

(A) prohibition, requirement, limitation, or other condition affecting the freedom of a person;

(B) withholding of relief;

(C) imposition of penalty or fine;

(D) destruction, taking, seizure, or withholding of property;

(E) assessment of damages, reimbursement, restitution, compensation, costs, charges, or fees;

(F) requirement, revocation, or suspension of a license; or

(G) taking other compulsory or restrictive action;

(11) "relief" includes the whole or a part of an agency—

(A) grant of money, assistance, license, authority, exemption, exception, privilege, or remedy;

(B) recognition of a claim, right, immunity, privilege, exemption, or exception; or

(C) taking of other action on the application or petition of, and beneficial to, a person;

(12) "agency proceeding" means an agency process as defined by paragraphs (5), (7), and (9) of this section; and

(13) "agency action" includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act.

5 U.S.C. § 702.

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

5 U.S.C. § 704.

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy

in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

Interstate Commerce Act

49 U.S.C. § 4(1).

It shall be unlawful for any common carrier subject to this chapter or chapter 12 of this title to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of like kind of property, for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance, or to charge any greater compensation as a through rate than the aggregate of the intermediate rates subject to the provisions of this chapter or chapter 12 of this title, but this shall not be construed as authorizing any common carrier within the terms of this chapter or chapter 12 of this title to charge or receive as great compensation for a shorter as for a longer distance: *Provided,* That upon application to the Commission and after investigation, such carrier, in special cases, may be authorized by the Commission to charge less for longer than for shorter distances for the transportation of passengers or property, and the Commission may from time to time prescribe the extent to which such designated carriers may be relieved from the operation of the foregoing provisions of this section, but in exercising the authority conferred upon it in this proviso, the Commission shall not permit the establish-

ment of any charge to or from the more distant point that is not reasonably compensatory for the service performed; and no such authorization shall be granted on account of merely potential water competition not actually in existence: *Provided further,* That any such carrier or carriers operating over a circuitous line or route may, subject only to the standards of lawfulness set forth in other provisions of this chapter or chapter 12 of this title and without further authorization, meet the charges of such carrier or carriers of the same type operating over a more direct line or route, to or from the competitive points, provided that rates so established over circuitous routes shall not be evidence on the issue of the compensatory character of rates involved in other proceedings: *And provided further,* That tariffs proposing rates subject to the provision of this paragraph requiring Commission authorization may be filed when application is made to the Commission under the provisions hereof, and in the event such application is approved, the Commission shall permit such tariffs to become effective upon one day's notice.

49 U.S.C. § 13(1).

Any person, firm, corporation, company, or association, or any mercantile, agricultural, or manufacturing society or other organization, or any body politic or municipal organization, or any common carrier complaining of anything done or omitted to be done by any common carrier subject to the provisions of this chapter in contravention of the provisions thereof, may apply to said Commission by petition, which shall briefly state the facts; whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint, or to answer the same in writing, within a reasonable time, to be specified by the Commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been done, the common carrier shall be

relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper.

49 U.S.C. § 15(1).

Whenever, after full hearing, upon a complaint made as provided in section 13 of this title, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this chapter for the transportation of persons or property, as defined in section 1 of this title, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this chapter, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this chapter, the Commission is authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare,

or charge for such transportation other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation of practice so prescribed.

49 U.S.C. § 15(7).

Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have, and it is given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased rate or charge for or in respect to the transportation of property, the Commission may by

order require the interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a change in a rate, fare, charge, or classification, or in a rule, regulation, or practice, after September 18, 1940, the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable, and the Commission shall give to the hearing and decision of such questions preference over all other questions then pending before it and decide the same as speedily as possible.

49 U.S.C. § 15a(2).

In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to the effect of rates on the movement of traffic by the carrier or carriers for which the rates are prescribed; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management to provide such service.

Order

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 25th day of November, A. D. 1968.

EX PARTE NO. 259
INCREASED FREIGHT RATES, 1968

The Commission having this day made a report containing its findings of fact and conclusions thereon with respect to the increased operating costs and additional revenue needs of the respondent railroads, together with other related matters, which report is hereby referred to and made a part hereof:

It is ordered, That, the petition filed by the respondents for leave to file a petition to vacate the order of suspension be, and it is hereby, granted.

It is further ordered, That, the order of June 19, 1968, be, and it is hereby, vacated and set aside insofar as it suspended the increases in rates and charges on all schedules except those set forth in Tariff Items 515 and 845 of the Tariff of Increased Rates and Charges, X-259, issued jointly by Western Trunk Line Committee, Agent, I.C.C. No. A-4696, and other designated agents, but that the suspension of schedules of increases contained in said Items 515 and 845 and the proceeding of investigation into all increases shall continue in full force and effect;

It is further ordered, That, the order of June 19, 1968, be, and it is hereby, vacated and set aside insofar as it limited any authorized increases to not exceed 3 percent or the maximums indicated, except as to the aforesaid Tariff Items 515 and 845, as to which the said 3 percent and the maximums shall continue to apply;

It is further ordered, That, the order of June 19, 1968, except to the extent modified herein shall remain in full force and effect until the further order of the Commission.

It is further ordered, That, freight rates and charges, to the extent authorized herein, may be made effective upon no less than 1 day's notice to the Commission and to the general public, by filing and posting in the manner prescribed in the Interstate Commerce Act;

And it is further ordered, That, all outstanding orders of the Commission be, and they are hereby modified to permit the increases authorized herein to become effective.

SUPPLEMENTAL FOURTH SECTION ORDER NO. 20213

It appearing, That, the Commission, by fourth-section order No. 20213 entered June 19, 1968, authorized carriers parties to the proceeding, Ex Parte No. 259, Increased Freight Rates, 1968, to establish and maintain the increased rates and charges described therein without observing the provisions of Section 4 of the Interstate Commerce Act;

It further appearing, That the Commission on this date has entered a further order in Ex Parte No. 259, authorizing certain increases in rates and charges for the transportation of property over lines of carriers parties to the proceeding within the United States, and that such increases cannot be made effective without producing in some instances rates or charges that yield greater compensation in the aggregate for the transportation of like kind of property for a shorter than for a longer distance over the same line or route in the same direction, over direct routes, or greater compensation as a through rate or charge than the aggregate of intermediate rates or charges subject to the Act, in contravention of Section 4 of the act; and that carriers parties to the proceeding have applied for relief from the provisions of Section 4 to the extent necessary to establish the authorized increases, which order and prior orders in Ex Parte No. 259 are hereby referred to and made a part hereof;

It is ordered, That, fourth-section order No. 20213, entered as aforestated, be and it is hereby, modified by adding the following paragraphs thereto:

It is further ordered, That, carriers subject to the Interstate Commerce Act and parties to said proceeding be, and they are hereby, authorized to depart from the provisions of Section 4 of the act to the extent necessary to establish and maintain the increases in rates and charges authorized in the order in Ex Parte No. 259 of this date, November 25, 1968.

It is further ordered, That, carriers parties to said proceeding be, and they are hereby, authorized to establish and maintain rates and charges authorized in the order of this date, November 25, 1968, without observing the long-and-short-haul provision of Section 4 of the act in cases arising out of the failure to apply the full increases in rates and charges over interstate routes between points in a single State, in turn caused by failure of the State authorities to authorize the full increases permitted in said proceeding.

And it is further ordered, That, in those instances in which rates and charges in contravention of Section 4 of the Act are established under the authority contained herein, the schedules containing such rates and charges shall make reference to this order in the manner required by rule 28 of Tariff Circular No. 20.

By the Commission.

H. NEIL GARSON,
Secretary.

(SEAL)